

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)
	)
ALMA COLLEGE, MOUNT PLEASANT	)
BAPTIST ACADEMY, MOUNT PLEASANT	)
PUBLIC SCHOOLS, AND CENTRAL	)
MICHIGAN UNIVERSITY	)
	)
Licenses of Instructional Television Fixed	)
Service Stations WNC270, WNC271, WNC272,	)
and WNC273, Mt. Pleasant, Michigan	)
	)
Request for Waiver	)

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 10, 2003**

**Released: October 17, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. In this *Memorandum Opinion and Order*, we address the request for waiver<sup>1</sup> jointly filed by Alma College (Alma), Mount Pleasant Baptist Academy (MPBA), Mount Pleasant Public Schools (MPPS) and Central Michigan University (CMU) (collectively the Parties), licensees, respectively, of Instructional Television Fixed Service (ITFS) Stations WNC270 (A Group channels), WNC271 (B Group channels), WNC272 (C Group channels), and WNC273 (D Group channels), Mt. Pleasant, Michigan. The Parties request waiver of Section 74.932(d) of the Commission's Rules, to allow the Parties to remain off the air for a period longer than one year without forfeiture of their licenses. The ITFS stations discontinued operations on June 23, 1997. For the reasons stated below, we dismiss the waiver request as moot with respect to Station WNC273 and deny the waiver request with respect to the other stations. We also determine that the licenses for Stations WNC270, WNC271, and WNC272 have been forfeited.

2. *Background.* On November 3, 1995, Alma certified construction of Station WNC270.<sup>2</sup> MPPS and CMU certified construction, of Stations WNC272 and WNC273, respectively, on June 5, 1996.<sup>3</sup> MPBA certified construction of Station WNC271 on June 11, 1996.<sup>4</sup> However, the Parties subsequently learned that the authorized facilities had inadvertently been constructed at an unauthorized location.<sup>5</sup> Accordingly, the stations were taken off the air on June 23, 1997.<sup>6</sup> On July 23, 1997, pursuant

<sup>1</sup> Letter from Laura C. Mow, Esq. to Barbara Kreisman, Chief, Video Services Division, Mass Media Bureau (dated June 22, 1998) (Waiver Request).

<sup>2</sup> Letter from Peter D. Shields, Esq. to William F. Caton, Acting Secretary (filed Nov. 3, 1995).

<sup>3</sup> Letter from Robert Janson, Superintendent, Mt. Pleasant Public Schools, to William F. Caton, Acting Secretary (filed June 5, 1996); Letter from Kenneth E. Johnson, Director of Telecommunications to William F. Caton, Acting Secretary (filed June 5, 1996).

<sup>4</sup> Letter from Terry F. Berman, Esq. to William F. Caton, Acting Secretary (filed June 11, 1996).

<sup>5</sup> Waiver Request at 1.

to Section 73.1740(a)(4) of the Commission's Rules,<sup>7</sup> the Parties sought approval to remain off the air for a period longer than thirty days.<sup>8</sup> The Parties stated that the owner of the authorized tower was willing to accommodate the Parties, but that actions must be taken to alleviate the load on the tower.<sup>9</sup> The Parties further stated that they had retained structural engineers to address the issue and present options to the Parties, and that once the Parties determine a solution to these issues the Parties would submit a full explanation of the steps that will be taken and the anticipated time frame necessary.<sup>10</sup>

3. On June 22, 1998, the Parties filed their waiver request.<sup>11</sup> The Parties state that the existing tower which they planned to use cannot be used due to overload problems, which could not be alleviated even by removing three existing antennas and two wave guides from the tower.<sup>12</sup> The Parties commenced discussions with Motorola, the owner and manager of the site, with respect to constructing a new tower at the site.<sup>13</sup> While foreseeing no problems, Motorola did note at the time -- October 1997 -- that a new tower would not be ready for at least a year.<sup>14</sup> However, one month later, the Parties learned that Isabella County had adopted a new ordinance requiring any new tower to be set back from any property line or easement by the tower's height, which made the Motorola site completely unusable for new construction.<sup>15</sup> In December 1997, the Parties located an adjoining parcel of land that could support the planned new tower, and spent the next four months negotiating with the owner and finalizing site plans.<sup>16</sup> In June 1998, the Parties tentatively agreed with the owner on leasing arrangements for the land, and began to take steps to obtain local zoning approval and to construct the tower.<sup>17</sup> The Parties stated that they did not expect to be able to reconstruct the stations until at least the first quarter of 1999.<sup>18</sup> The Parties further stated, however, that "there was and is no intention to 'permanently discontinue' operations," as shown by "numerous and continual actions taken . . . to . . . reconstruct the stations . . . ."<sup>19</sup> The Parties noted that other broadcast licenses have received extensions or temporary authority to remain off-the-air for longer periods of time than the Parties have sought.<sup>20</sup> In many of those situations, however,

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<sup>6</sup> *Id.*

<sup>7</sup> 47 C.F.R. § 73.1740(a)(4).

<sup>8</sup> Letter from Laura C. Mow, Esq. to Clay Pendarvis, Chief, Television Branch, Mass Media Bureau (dated July 23, 1997) (73.1740 Notification).

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *See* Waiver Request.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

<sup>20</sup> The Parties cite by way of example Twenty-One Sound Communications, Inc., *Memorandum Opinion and Order*, 11 FCC Rcd 12811 ¶ 2 (1996). *See* Waiver Request at 3.

the licensees had never constructed their stations in the first instance, unlike the Parties, who also note that they do not face financial problems that would prevent operation of their stations.<sup>21</sup>

4. Although not reported by the Parties, CMU surrendered its license for Station WNC273 for cancellation on January 14, 2003.<sup>22</sup> The license was cancelled on February 3, 2003.<sup>23</sup>

5. At the request of Commission staff, the Parties updated their Waiver Request on May 8, 2003.<sup>24</sup> In their Waiver Update, the Parties note that during the period of time encompassing their attempts to construct at the authorized site, “significant changes were occurring in the rules governing ITFS/MDS, creating uncertainty and change in the industry. Moreover, severe financial issues were affecting nearly every commercial operator in the industry, including Mount Pleasant Wireless -- the commercial operator working with each of the [Parties].”<sup>25</sup> The Parties state that the initial construction of their stations “required a significant outlay of money, time and resources,” and both they and Mount Pleasant Wireless (“MPW”) seek “the assurance of knowing that the waiver would be granted and their licenses deemed valid” before incurring additional construction expenditures.<sup>26</sup> The Parties state that they and MPW are prepared to move forward upon disposition of the waiver request.<sup>27</sup>

6. *Discussion.* Section 74.932(d) provides, in relevant part, that

In case of permanent discontinuance of operation of a station licensed under this subpart, authority to operate is forfeited and the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, a station which is not operated for a period of one year is considered to have been permanently discontinued.<sup>28</sup>

The Commission may waive its rules “if good cause therefor is shown.”<sup>29</sup> Pursuant to Section 73.3566(a) of the Commission's Rules,<sup>30</sup> “[r]equests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof.” An applicant for waiver faces a “high hurdle” and “must plead with particularity the facts and circumstances which warrant such action.”<sup>31</sup> Moreover,

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<sup>21</sup> Waiver Request at 3.

<sup>22</sup> Letter from Chief Technology Officer, Central Michigan University to Federal Communications Commission (dated January 14, 2003) (License Surrender Letter).

<sup>23</sup> *Public Notice, Wireless Telecommunications Bureau Site-by-Site Action*, Report No. 1413 at 27 (released Feb. 12, 2003). See also letter from Mary M. Shultz, Chief, Licensing & Technical Analysis Branch, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau to Central Michigan University (dated Feb. 5, 2003).

<sup>24</sup> Letter from Laura C. Mow, Esq. to Barrett L. Brick, Wireless Telecommunications Bureau (dated May 8, 2003) (Waiver Update).

<sup>25</sup> Waiver Update at 1.

<sup>26</sup> *Id.* at 1-2.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> 47 C.F.R. § 74.932(d).

<sup>29</sup> 47 C.F.R. § 1.3.

<sup>30</sup> 47 C.F.R. § 73.3566(a). This rule is applicable to ITFS licensees. See 47 C.F.R. § 74.910.

<sup>31</sup> *WAIT Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*); *Burlington Cablevision, Inc., Order on Reconsideration*, 13 FCC Rcd 772, 778 (1998).

“the applicant for waiver must articulate a specific pleading, and adduce concrete support, preferably documentary.”<sup>32</sup>

7. Initially, we conclude that the Waiver Request is moot with respect to Station WNC273 because CMU turned in that license for cancellation. In surrendering its license for Station WNC273 for cancellation, CMU stated that “Station WNC-273 has never been constructed . . . .”<sup>33</sup> We note that CMU’s statement is inconsistent with its certification of completion of construction and with the representations made in the Waiver Request. In light of our action canceling the licenses, we conclude that we need not investigate the discrepancy at this time since it is not decisionally relevant to the resolution of the matter currently before us.

8. Based upon the record before us, we cannot conclude that the Parties have shown good cause for waiving Section 74.932(d). The Commission adopted Section 74.932(d) to ensure the efficient use of the spectrum by mandating the forfeiture of licenses that have been unused for more than one year.<sup>34</sup> Initially, the Parties have not explained why they did not construct the stations at the correct location or why they were unaware of that problem until some point after the stations were constructed. We cannot conclude that the Parties have acted diligently because, based upon the record currently before us, they failed to properly monitor the construction of their stations. We believe that granting a waiver to the Parties would be inconsistent with the underlying purposes of the rule because the Parties have not acted in a manner that would promote the efficient, effective and expeditious use of their facilities.

9. Furthermore, the Parties appear to have had a reasonable alternative to discontinuing operation. Specifically, the Parties could have requested special temporary authority to operate the stations while seeking to modify their licenses for authority to operate either from the location where they were constructed or at another site. That course of action would have allowed the Parties to continue operating their stations while they continued their efforts to come into compliance with the Commission’s Rules. The Parties do not explain why they rejected that course of action.

10. We also conclude that the Parties’ argument in the Waiver Update do not provide a basis for granting a waiver. In the Waiver Update, the Parties cite to significant industry and regulatory changes and significant initial expenditures of money.<sup>35</sup> In their Waiver Request, however, the Parties indicated that they did not have financial problems.<sup>36</sup> Accordingly, it appears that the Parties made a voluntary business decision not to reconstruct their stations.<sup>37</sup> We find that the Parties’ submissions in this proceeding, particularly the incomplete and contradictory information presented, does not constitute a sufficient showing that grant of a waiver is warranted.

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<sup>32</sup> *WAIT Radio*, 418 F.2d at 1157 n. 9.

<sup>33</sup> License Surrender Letter at 1.

<sup>34</sup> See Amendment of Part 74 of the Commission’s Rules and Regulations in regard to the Instructional Television Fixed Service, *Report and Order*, 98 FCC Rcd 952, 937 (1984).

<sup>35</sup> Waiver Update at 1-2.

<sup>36</sup> Waiver Request at 3.

<sup>37</sup> See Waiver Update at 2 (“Accordingly, the commercial operator and Licenses have essentially maintained a holding pattern pending resolution of the waiver request.”)

11. In view of the foregoing, we conclude that a waiver is not warranted under the circumstances presented. We also conclude that the licenses for Stations WNC270, WNC271, and WNC272 should be deemed forfeited.<sup>38</sup>

12. Accordingly IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the request for waiver jointly filed by Alma College, Mount Pleasant Baptist Academy, Mount Pleasant Public Schools, and Central Michigan University on June 22, 1998 IS DISMISSED AS MOOT with respect to Station WNC273 and is otherwise DENIED.

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 74.932(d) of the Commission's Rules, 47 C.F.R. § 74.932(d), that the licenses for Stations WNC270, WNC271, and WNC272 ARE DEEMED FORFEITED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>38</sup> Because CMU has surrendered its license for WNC273 for cancellation, and the license has been cancelled, we need not now take forfeiture action with respect to this license.